



WISCONSIN LEGISLATIVE COUNCIL

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TO: THE SPECIAL TASK FORCE ON UW RESTRUCTURING AND OPERATIONAL FLEXIBILITIES

FROM: Mary Matthias, Senior Staff Attorney

RE: Statutory Changes Required to Implement a Proposal for Retention Payments for a University of Wisconsin (UW) Chancellor

DATE: May 2, 2012

This memorandum responds to your request for a discussion of the statutory changes that would be necessary to enable a private foundation established for the benefit of a UW institution to make payments from a “retention fund” to the chancellor of that UW institution. As proposed, the foundation would establish a retention fund and commit to paying the chancellor a certain amount from the fund if the chancellor remained at the institution for a specific period of time. If the chancellor terminated his or her employment prior to the agreed-upon date, the chancellor would receive nothing from the fund. The chancellor would not be required to perform any specific duties for the foundation in order to receive payment from the foundation.

As discussed below, it appears likely that ss. 946.12 (5) and 19.45 (2) and (3), Stats., would have to be amended to enable a foundation to make, and a chancellor to accept, retention payments as described above. This could be achieved by creating specific exceptions from the prohibitions in those statutes to allow these types of payments to be made and accepted.

Also, as discussed below, it appears unlikely that the proposed payments would violate Wis. Const. art. IV, s. 26, or be in conflict with s. 36.09 (1) (j) or 20.923 (4g), Stats., which generally authorize the Board of Regents (BOR) to establish the chancellor’s salary within a specified salary range.

Finally, it should be noted that there may be federal laws or regulations, particularly those pertaining to the tax treatment of retirement benefits, that may have an impact on the feasibility of the payments proposed. This memorandum does not address this topic.

Section 946.12 (5), Stats. -- Misconduct in Public Office

In an informal written opinion provided to Katharine Lyall, then President of the UW System, on November 9, 2000, Attorney General Doyle discussed the legality of a proposal in which the UW Foundation would pay the Chancellor of UW-Madison for providing personal services to the Foundation. The UW Foundation proposed to enter into a contract with the Chancellor, under which the Chancellor would be compensated by the Foundation for various services related to an upcoming major fundraising campaign for the Foundation. In his opinion, the Attorney General discussed whether the arrangement would violate s. 946.12 (5), Stats., which provides as follows:

946.12 Misconduct in public office. (intro.) Any public officer or public employee who does any of the following is guilty of a Class I felony:

....

(5) Under color of the officer's or employee's office or employment, intentionally solicits or accepts **for the performance of any service or duty** anything of value which the officer or employee knows is greater or less than is fixed by law. [Emphasis added.]

The Attorney General stated that this provision does not prohibit a state employee from accepting employment outside of his or her state position, but rather prohibits a state employee from accepting outside payment for activities that are included within the job duties of his or her state position. The Attorney General noted that chancellors are expected to engage in fundraising activities as part of their normal job duties. He analyzed the proposed arrangement between the Chancellor and the UW Foundation to determine whether the duties the Chancellor would be required to perform were "beyond those historically provided by past UW chancellors." He stated that if the services proposed to be provided to the Foundation by the Chancellor were in fact beyond those traditional services, the proposed arrangement would not violate s. 946.12 (5), Stats.

Applying that analysis to the proposal at hand, it appears that if a chancellor were to accept payments from an outside party in exchange for merely remaining in the chancellor position, he or she could be found to be in violation of s. 946.12 (5), Stats. Since the proposed contract would not require the chancellor to perform any duties beyond those traditionally performed by a UW chancellor, the chancellor would be accepting payment for the performance of his or her job duties which is greater than is fixed by law, which is prohibited by s. 946.12 (5), Stats.

Section 19.45 (2) and (3), Stats. -- Standards of Conduct; State Public Officials

Section 19.45 (2) and (3), Stats., provide as follows:

19.45 Standards of conduct; state public officials.

(2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not

prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

In the informal opinion discussed above, the Attorney General did not discuss whether the acceptance of payments by the Chancellor in exchange for providing services to the UW Foundation violated the prohibition against a state public official using his or her public position or office to obtain financial gain or anything of substantial value for his or her private benefit. Rather, the Attorney General accepted the premise that the Chancellor was required to perform specific services for the Foundation in order to receive the payments.

The retention fund payments that are proposed currently, however, would not require a chancellor to provide any services to the Foundation. Rather, the payments would be made to the chancellor for the sole reason that the individual receiving the payments holds a public position -- the position of university chancellor. The payments would be of substantial value and would be for the private benefit of the chancellor. Thus, if a chancellor accepted the payments, he or she would likely be acting in violation of s. 19.45 (2), Stats.

It is also possible that the offering or acceptance of retention payments as proposed could be a violation of s. 19.45 (3), Stats., since the payments could reasonably be expected to influence the chancellor's official actions or be considered as a reward for his or her official action or inaction, i.e., the action of remaining in the position of chancellor.

Wisconsin Constitution, Article IV, Section 26 -- Extra Compensation; Salary Change

The relevant portions of Wis. Const. art. IV, s. 26 provide as follows:

(1) The legislature may not grant any extra compensation to a public officer, agent, servant or contractor after the services have been rendered or the contract has been entered into.

(2) Except as provided in this subsection, the compensation of a public officer may not be increased or diminished during the term of office:

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(3) Subsection (1) shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the

members elected to both houses of the legislature and such act provides for sufficient state funds to cover the costs of the increased benefits

In a formal opinion to Assembly Speaker Jackamonis dated December 24, 1981, Attorney General LaFollette discussed the legality of the BOR providing a deferred compensation plan for the UW President. The plan was similar in some respects to the retention payment proposal currently under consideration for the UW System.

The background of the 1981 Opinion is as follows. In 1971, the BOR passed a resolution providing that “deferred salary” payments would be made to John Weaver, who had been appointed as UW System President the previous year. The resolution stated that the payments would be made only if Weaver served as President for at least three years, and that the payments were in accordance with an “informal understanding” in place at the time Weaver was appointed. The Attorney General concluded that the BOR lacked authority to enter into the agreement with the President and lacked authority to provide a deferred salary plan to the President. The Attorney General explained that the plan under consideration was not a “salary,” which the BOR did have statutory authority to establish, but rather was a retirement plan. He stated that the Legislature had included the office of UW System President in a specific retirement system and the BOR lacked authority to provide any other retirement plan for that position.

The Attorney General was also asked to consider whether Wis. Const. art., IV, s. 26, would prohibit the Legislature from passing legislation to provide a deferred salary plan to Weaver. The Attorney General stated that the constitutional provision prohibits any retroactive increase in compensation, but does allow the Legislature to increase retirement benefits after a person has retired. However, he concluded that authority is limited to increasing only those retirement benefits that are provided under a retirement system of which the person was a member while employed. The amounts that were proposed to be provided to Weaver under the deferred salary plan were outside of the retirement system and therefore were prohibited by the constitutional provision.

It does not appear likely that the Legislature’s act of approving legislation to enable the Foundation to legally provide retention payments to a chancellor would violate Wis. Const. art., IV, s. 26. The constitutional provision prohibits the *Legislature* from granting extra compensation. In the proposed scenario, the foundation, not the Legislature, would be providing the compensation. Even if the Legislature were to enact the statutory modifications needed to make the payments legal, the foundation would decide whether to make the payments and no state funds would be involved.

It could be argued that, in any event, any potential violation of Article IV, s. 26 would be avoided if the employment contract between the chancellor and the UW specified that the chancellor would be permitted to accept retention payments from the foundation if those payments were not in violation of state law.

Sections 36.09 (1) (j), and 20.923(4g), Stats. -- Establishment of a Chancellor’s Salary

An additional question that has been raised is whether the proposed retention payments would be subject to current law provisions limiting chancellors’ salaries and restrictions on salary increases. Section 20.923 (4g), Stats., provides that the Board of Regents shall establish salary ranges for certain senior executives, including chancellors, based on an analysis of salaries paid at comparable universities

in other states. Section 36.09 (1) (j), Stats., provides that the Board of Regents shall establish salaries for most UW employees, including chancellors, and sets certain restrictions on the Board's authority to provide salary increases to those employees. It appears that these provisions relate to and restrict only the salary amounts paid by the Board of Regents and would not apply to salary or other compensation paid by a private foundation. As discussed above, such payments are currently prohibited by s. 19.45 (2) and (3), Stats., as well as s. 946.12 (5), Stats., except when the chancellor performs duties in addition to his or her normal duties as chancellor for that foundation. If those statutes were amended to permit a chancellor to receive retention payments from an outside source, it may be advisable to consider whether the statutes should establish limits on the amount of retention payments which may be allowed.

Summary

In summary, it appears that aspects of the proposal for a private foundation established for the benefit of a UW institution to make retention payments to a chancellor of that UW institution, as described above, would likely be in violation of ss. 19.45 (2) and (3) and 946.12 (5), Stats. These statutes could be amended to enable the foundation to provide, and the chancellor to accept, retention payments as proposed.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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